Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DONALD PAQUETTE,

Petitioner

v.

THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the due process clause of the Fourteenth Amendment permits a court, exercising its inherent authority, to revoke bail and order pretrial detention based on (1) a non-adversarial determination that there is probable cause to believe that the accused violated any condition of pretrial release and (2) a discretionary determination that the accused is dangerous.

2. Whether the due process clause of the Fourteenth Amendment is violated by a bail revocation statute that permits pretrial detention of an accused for sixty days in the general prison population based on (1) probable cause to arrest for any crime and (2) a discretionary determination of dangerousness, with (a) no consideration for conditional release and (b) no opportunity to re-open the hearing.

3. Whether a bail revocation statute, as construed, violates the due process requirements of the Fourteenth Amendment where an accused is incarcerated for sixty days for violating a condition of release based on (1) probable cause to arrest and (2) a discretionary determination of dangerousness, where (a) the court relies on multiple hearsay statements in a non-investigative police report, (b) specific reasons for the revocation of release are not written or provided to the accused on request, and (c) testimony by witnesses and the accused are at the discretion of the judge.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donald Paquette respectfully petitions for Writ of Certiorari to review the Judgment of the Supreme Judicial Court of Massachusetts in this case.

OPINION BELOW

The Supreme Judicial Court of Massachusetts issued a rescript opinion in this case on September 9, 2003, pursuant to local Rule 23 of the Massachusetts Rules of Appellate Procedure. On October 14, 2003, Judgment was entered on the docket and the case is published as Paquette vs. Commonwealth, ___ Mass. ___; ___ N.E.2d ___; (2003-148). That opinion is reprinted in full as Appendix A.

JURISDICTION

The Judgment of the Supreme Judicial Court of Massachusetts was entered on October 14, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part that "The right of the people to be secure in their persons,...against unreasonable...seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the...persons or things to be seized."

The Sixth Amendment to the United States Constitution provides in relevant part that "In all criminal prosecutions, the

accused shall...be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Eighth Amendment to the United States Constitution provides in relevant part that "Excessive bail shall not be required,...nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

18 U.S.C.S. § 3142 (2002)

§ 3142. Release or detention of a defendant pending trial

Appears in full at Appendix C, Page 2.

M.G.L. c. 276, § 58, Paragraph 3

§ 58. Release on personal recognizance or unsecured appearance bond; determination; fees; refusal; petition for review.

Appears in full at Appendix C, Page 11.

M.G.L. c. 276, § 58A

§ 58A. Pretrial Detention or Release on Condition for Certain Offenders; Hearing; Petition for Review.

Appears in full at Appendix C, Page 14.

STATEMENT OF THE CASE

a. Summary of the Facts

On September 23, 2002, the Petitioner (hereinafter referred to as defendant) was arraigned in district court on a charge of violating an abuse prevention order issued pursuant to M.G.L. c.209, §7A for allegedly calling the complainant on the telephone. An attorney from the Committee for Public Counsel Services (CPCS) was appointed by the court to represent him. He was subsequently released on personal recognizance following a bail review in the superior court.

On September 26, 2002 the defendant was re-arrested on the same charge, this time for allegedly having a third party call the complainant. The complainant did not report the alleged call until a day after it was supposedly made. At the arraignment on the new charge, the government requested that the defendant's release on the prior charge be revoked pursuant to paragraph three of M.G.L c.276, §58 (See App. C – 11). The district court judge (Welch, J.) scheduled a bail revocation hearing for the following morning, September 27, 2002. Shortly before the hearing began, the judge appointed a different CPCS attorney to represent the defendant at the revocation proceeding.

The only evidence submitted by the government in support of its request for revocation was a half page, typewritten offense report and a copy of the defendant's board of probation record. Reading from the offense report, the prosecutor advised the judge of the allegation that the defendant had his roommate call the complainant on the telephone. The prosecutor then requested that

the court revoke the defendant's release based on dangerousness and for not following the orders of the court.

At the outset of his argument, Defense counsel confirmed with the court that only the alleged new offense could be considered for purposes of the revocation. He proceeded to argue that the restraining order may not even be valid based on information he had that indicated service of the order may not have been made to the defendant. He also argued that there was possibly an issue as to whether the alleged "permanent" restraining order was constitutional. As to these issues, defense counsel requested the court hold a separate hearing, arguing that if the order wasn't valid there would be no legal basis for the new charge and thus no basis for a revocation. That request was not granted and the bail revocation proceeding continued.

Citing Commonwealth v. Durling, 407 Mass. 108 (1990), counsel argued against revocation stating that the police report offered by the Commonwealth was unreliable because it contained only multiple levels of hearsay, and the government had failed to produce any independent evidence whatsoever in support of its request. Counsel also argued that the complainant's reliability was at issue based on information that she may have a criminal record.

The judge then stated he found probable cause to believe the defendant committed a new crime and revoked his release, ordering him held for up to sixty days in the House of Correction. The judge made no reference or finding on the record as to the defendant's dangerousness, but filled out a pre-printed form entitled "Revocation of Release." (See App. B – 2).

Defense counsel objected to the revocation of bail citing articles 12, 11 and 14 of the Massachusetts Declaration of Rights and the 4th, 5th, 6th and 14th Amendments to the United States Constitution, arguing that the defendant had been denied a hearing, denied an opportunity to discover the validity of the restraining order, denied the right to counsel, and denied the right to testify. Noting the objections, the judge then reaffirmed the order revoking bail.

Following a short recess, on the record and with all parties still present, defense counsel requested that the court re-open the bail revocation hearing to allow testimony of two defense witnesses who, (unbeknownst to him previously), had been present at the earlier hearing and had instructed only the court officers that they wished to testify for the defendant. Counsel advised the court that the first witness was the person alleged to have made the telephone call to the complainant and that he would deny having made such a call, and the second witness would testify that the complainant had told her she was going to frame the defendant with a claim that he violated a restraining order. After advising the Court of the nature of the testimony being offered, Counsel was denied a further hearing.

Immediately thereafter, defense counsel submitted a written motion for findings of fact and rulings of law, stating such was necessary for purposes of a possible interlocutory appeal. That motion was also denied.

b. Course of Proceedings and Disposition Below

On October 7, 2002, the defendant filed a petition for writ of habeas corpus in the Superior Court challenging the revocation of bail. On October 15, 2002 the petition was denied for lack of jurisdiction. On October 21, 2002, the defendant filed a Petition for Extraordinary Relief to a single justice of the Supreme Judicial Court of Massachusetts pursuant to M.G.L c.211, §3, seeking to vacate the pretrial detention order of the District Court.

After a hearing on October 27, 2002, the single justice (Spina, J.) reserved and reported the case to the full court because it raised questions having statewide significance. The question of law reported was "What procedure is required when a defendant's bail is revoked pursuant to M.G.L. c.276, §58, and whether that procedure was followed with respect to defendant Paquette." The parties submitted briefs and oral arguments were held on May 6, 2003.

As to paragraph three of M.G.L. c.276, §58, the bail revocation statute, the defendant argued that since there is no relationship between the commission of non-violent crimes and dangerousness, the statute is not narrowly tailored to further a compelling government interest and is therefore unconstitutional because it constitutes punishment prior to a finding of guilt. That paragraph allows revocation of release and pretrial detention for the probable commission of *any* crime, whenever a judge, in his or her discretion, believes an accused is dangerous.

Further, he argued that the procedure outlined in paragraph three does not provide minimum due process protections because it

does not require the government to present any witnesses, nor does it grant an accused other necessary rights such as the right to testify or present witnesses at a revocation hearing, the opportunity to re-open the hearing, the opportunity for conditional release, or the right to be held separately from those convicted while being detained.

Moreover, the defendant argued that the only constitutionally acceptable standard of proof in a pretrial detention hearing based on dangerousness is by clear and convincing evidence. Furthermore, that the process to determine whether there is probable cause that a crime was committed must be one akin to that in making a directed verdict determination, not merely based on a finding that there was probable cause to arrest.

Finally, the defendant argued that paragraph three of M.G.L. c.276, §58 violates the equal protection clause because it allows the government exclusively to choose a less protective procedure when seeking pretrial detention based on dangerousness than that mandated under M.G.L. c.276, §58A, (which specifically deals with pretrial detention based on dangerousness), even though the alleged crime is one specifically enumerated under that section.

Turning specifically to the issues in his case, defendant argued first that his constitutional right to due process was violated by the district court's reliance on unsubstantiated, unreliable hearsay evidence in revoking his release, without any requirement that the government show good cause for not presenting witnesses.

Next, he argued that the district court violated his right to due process by refusing to provide a written statement of reasons

for ordering pretrial detention, and furthermore, that the order of pretrial detention was unconstitutional because there was no finding on the record of dangerousness. Finally, that based on the offense with which he was charged, the appropriate hearing should have been pursuant to M.G.L. c.276, §58A, which closely mirrors the procedure for pretrial detention under 18 U.S.C.S. §3142 and affords the required due process protections.

Following oral arguments in May 2003, on September 9, 2003 the Supreme Judicial Court directed that an order affirming the bail revocation be entered. The final entry of judgment was made on the docket October 14, 2003 in accordance with Rule 28 of the Massachusetts Rules of Appellate Procedure. The case is reported as Paquette vs. Commonwealth, ___ Mass. ___; ___ N.E.2d ___; (2003-148) and is reprinted herein at Appendix A.[1]

REASONS FOR GRANTING THE PETITION

I. THIS CASE RAISES IMPORTANT CONSTITUTIONAL QUESTIONS CAPABLE OF REPETITION YET LIKELY TO ESCAPE REVIEW

Paragraph three of M.G.L. c.276, §58 permits a court to revoke bail and order pretrial detention for up to sixty days. It is highly likely that in a majority of cases, like the one at bar, before a challenge to the revocation process can reasonably be prepared and acted upon, the issue will have passed. Such is likely by either the

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[1] After serving sixty days of pretrial detention but prior to entry of the judgment, the Petitioner was released and both of the charges against him discussed herein were ultimately dismissed.

accused having served the sixty days, by entry of a plea during the pretrial detention period, or by dismissal of the charge(s). Furthermore, given that the only means to review a bail revocation is by petition for extraordinary relief to a single justice of the State's highest court, a time-consuming process indeed, it is even more likely that the sixty days will pass before review can occur. See Sheriff of Suffolk Cty. v. Pires, 438 Mass. 96, 100; 777 N.E.2d 1231, 1234 (2002); Delaney v. Commonwealth, 415 Mass. 490, 497; 614 N.E.2d 672 (1993). In similar circumstances to this where a controversy was "by its nature short-lived," this Court concluded that a case is not moot where it may be capable of repetition yet evade review. Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976).

While it is generally required that in order to avoid mootness, both the challenged action must in its duration be too short to be fully litigated prior to its cessation or expiration, and also that there is a reasonable expectation that the same complaining party would be subjected to the same action again, Murphy v. Hunt, 455 U.S. 478 (1982), in United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980), this Court recognized that "Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." Id., at 399. Moreover, in a case similar to this one where pretrial detention was an issue, this Court found it a suitable exception to the general requirements stating "It is by no means certain that any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class." Gerstein v. Pugh, 420 U.S. 103, 111; 95 S. Ct. 854, 861 (1975).

Applying these principles, Petitioner respectfully requests that the Court find his case a suitable exception to the general requirements, thereby avoiding mootness and allowing review of the important constitutional questions.

II. PRETRIAL DETENTION PURSUANT TO PARAGRAPH THREE OF M.G.L c.276, §58 DOES NOT COMPORT WITH MINIMUM DUE PROCESS REQUIRED UNDER THE FEDERAL BAIL STATUTE AT 18 U.S.C. §3142

Paragraph three of M.G.L. c.276, §58 allows pretrial detention of an accused based on a discretionary judicial determination of dangerousness, after a finding of probable cause that the accused committed *any* crime while on release. The Supreme Judicial Court in this case instructs further that in a proceeding to revoke bail under paragraph three, "an evidentiary hearing with the right to present and cross-examine witnesses, or some variation, *may* be held *in the judge's discretion* when the circumstances of a particular case warrant." (emphasis added) (See App. A – 16).

The Federal Bail Statute, 18 U.S.C. §3142 outlines specifically the process a court must follow before issuing an order for pretrial detention of an accused based on dangerousness. This Court, in United States v. Salerno, 481 U.S. 739, 750 S. Ct. 2095 (1987) held that those procedures fully comport with constitutional requirements. "In a full-blown adversary hearing, the Government must convince a neutral decision-maker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." Id., 750 (citation omitted).

The hearing required pursuant to the Massachusetts bail revocation statute is far less than the "full blown adversarial hearing" described in Salerno. Among the procedural requirements absent from the Massachusetts bail revocation statute are that the government be required to present witnesses, the right for an accused to testify or present witnesses, the opportunity for an accused to re-open the hearing, the opportunity for conditional release, or the right to be held separately from those convicted while being detained. Moreover, a finding of dangerousness need not even be supported by the constitutionally valid clear and convincing evidence standard, but instead is made at the discretion of the judge. Such procedures do not comport with federal due process requirements when making determinations of dangerousness that hold as a consequence pretrial detention of an accused individual. While these due process protections are absent from the Massachusetts bail revocation statute, they are all present in another section of the law, M.G.L. c.276, §58A, which was adopted in 1992 following the decision in Salerno. That section applies only to a specific group of crimes identified as serious or violent and specifically addresses the procedures necessary when the government seeks to detain an accused based on dangerousness and very closely mirrors the requirements in Federal Bail Statute at 18 U.S.C §3142. (See App. C – 2, 14). What is additionally unfair is that notwithstanding §58A, even in a case such as this one where an accused is charged with an offense specifically enumerated there, the government may, at its discretion, choose instead to proceed pursuant to the bail revocation section (paragraph three, §58), thus avoiding a significantly more protective process. This is unfair and violates established principles of due process.

Finally, 18 U.S.C. §3148(b) addresses the procedure that is required in order to revoke the release of an accused who had been previously released *after* a judicial finding of dangerousness pursuant to §3142. In that case, the court is required to conduct another hearing pursuant to that section. Furthermore, consideration of conditional release is called for except in certain limited circumstances. In effect, under the federal revocation statute, a person previously adjudicated to be dangerous who is facing revocation of release receives more due process than an individual subject to potential revocation in Massachusetts who has never been adjudicated as dangerous.

III. DUE PROCESS UNDER THE FOURTEENTH AMENDMENT DEMANDS THAT IN A BAIL REVOCATION PROCEEDING WHERE PRETRIAL DETENTION OF AN ACCUSED IS SOUGHT FOR A SUBSTANTIAL PERIOD, EVIDENCE MUST BE SUBSTANTIALLY RELIABLE

This Court has found that "Whatever procedure a State may adopt, it must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." Gerstein v. Pugh, 420 U.S. 103, 125; 95 S. Ct. 854, 868 (1975). Even where an accused has already been convicted, the Circuit Court in the District of Columbia has recently held that "Revocation of parole requires more than a finding of probable cause and must be based on verifiable facts." Crawford v. Jackson, 323 F.3d 123, 129; No. 02-7009 (2003). Stating it joined the other circuits "in expressing concern about the reliance in parole revocation hearings on hearsay in police reports," the Circuit Court in Crawford further directed

that "a decision to revoke...will not be judicially sustained where it relies solely on hearsay...in a police report as the basis for its decision." Id.

In another recent case similar to the one at bar but involving a federal bail revocation issue, the Second Circuit Court addressed the necessity for reliable evidence. U.S. v. LaFontaine, 210 F.3d 125, 131, Docket No. 00-1157, (2000). There, noting at the outset that the case raised issues of first impression concerning the constitutionality of proffers in bail revocation proceedings under the federal statute, the Second Circuit Court advised:

> ...[T]his court has recognized that while the informality of bail hearings serves the demands of speed, the....judge must insure the reliability of the evidence "by selectively insisting upon the production of the underlying evidence or evidentiary sources where their accuracy is in question." Martir, 782 F.2d at 1147 (emphasis omitted) (quoting Acevedo-Ramos, 755 F.2d at 207). In Martir, a case where the government argued that defendant posed a risk of flight and proceeded solely by proffer, we stated that "in the informal evidentiary framework of a detention hearing, the methods used to scrutinize government proffers for reliability must lie within the discretion of the presiding judicial officer, informed by an awareness of the high stakes involved." Id. at 1147. In that case, we criticized the government's proffer for simply stating in "general and conclusory terms what it hoped to prove," for failing to refer to any "independent evidence, such as tapes,

documents, or photographs," and for failing to furnish any testimony or affidavits. Id., at 131

Ruling on the sufficiency of the evidence in the present case, the Supreme Judicial Court noted that "Statements of police officers concerning their own observations and a description of their own activities, as well as those of other officers, are similarly reliable for purposes of establishing probable cause." (citation omitted) (See App. A – 17). Without more, the court then concluded that the district court judge could properly rely on the information in the police report to make a determination of probable cause. That conclusion is unsupported by any proffer by the government of substantially reliable evidence. Moreover, the evidence in this case was significantly less substantial than the government proffer that was at issue in Lafontaine. In that case, where it was argued that the lower court could not rely solely on a proffer by the government to revoke bail, the Circuit Court found that it was "inaccurate to characterize the court's decision as based solely on the government's proffer...the proffer was corroborated by extrinsic evidence such as the...tape. Further,...the proffer was not contradicted by...witnesses." Id.

In this case the officer who wrote the proffered report did not testify at the hearing, nor did the alleged third party who was reported to have made the telephone contact with the complainant, nor did the complainant herself. Instead, at the revocation hearing, the prosecutor simply read from the officer's report. The only reference in the report as to the officer's own activities was that he made a telephone call to verify that a restraining order against the defendant existed, without noting whether service had been made on the defendant. The report was further devoid of any detail

whatsoever about how or exactly when the complaint was taken, whether the officer met with the complainant in person or received the complaint by telephone, what number the alleged call was received at, or whether any investigation was done to corroborate that a call was even made. There was no indication whatsoever in the report as to the whether the complainant had any concern about being in danger, however, it was certainly indicative from the report that she was not since the alleged telephone call wasn't reported to police until a day later. What the government's testimonial evidence amounted to was nothing more than the prosecutor *telling* the judge that the police officer *wrote* that the complainant *said* that the defendant's friend *said* that the defendant *said* to contact her. Multiple hearsay statements such as these cannot possibly support a probability that a crime was committed when a person who is presumed innocent is facing sixty days incarceration in the general prison population among those already convicted. "[T]he prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial..." Gerstein at 119. Unlike the case where a person is held pursuant to the Fourth Amendment for the purposes of further proceedings, when a person is detained pending trial "the standard of proof required of the prosecution is usually referred to as 'probable cause' but in some jurisdictions it may approach a prima facie case of guilt. (citation omitted) When the hearing takes this form, adversary procedures are customarily employed. The importance of the issue to both the state and the accused justifies the presentation of witnesses and full exploration of their testimony on cross examination." Gerstein at 119, 120.

As to whether sixty days incarceration constitutes a substantial period of detention, this Court has indicated that pretrial

detention for a period of thirty days constitutes a substantial amount of time.

> The only possible methods for obtaining a judicial determination of probable cause were a special statute allowing a preliminary hearing after 30 days,...and arraignment, which...was often delayed a month or more after arrest. Pugh v. Rainwater, 332 F.Supp. 1107, 1110 (SD Fla. 1971). As a result,...a person...could be detained for a substantial period solely on the decision of a prosecutor. Gerstein, at 125.

Applying that principal, the sixty days pretrial detention involved must certainly be considered a substantial period of detention.

IV. THE PROCEDURE SANCTIONED BY THE SUPREME JUDICIAL COURT REVOKING BAIL UNDER ITS INHERENT AUTHORITY AMOUNTS TO PUNISHMENT FOR CONTEMPT WITHOUT MINIMUM DUE PROCESS AND IS AN ABUSE OF DISCRETION

This Court has recognized that even for state proceedings, the label affixed to contempt ultimately "will not be allowed to defeat the applicable protections of federal constitutional law." United Mine Workers v. Bagwell, 512 U.S. 821 (1994) citing Hicks v. Feiock, 485 U.S. at 631.

While "it is firmly established that the power to punish for contempt is inherent in all courts," and that power "...reaches both conduct before the court and that beyond the court's confines,..." Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1991); See also Young

v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798 (1987) (citations omitted), such power is not without significant limitations. "Because of their very potency, inherent powers must be exercised with restraint and discretion." Id., at 44; See also, Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). "A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process..." Id., at 48.

In Carlisle v. U.S, 517 U.S. 416, 426 (1996), this Court instructed that "Whatever the scope of federal courts' inherent power to formulate procedural rules not specifically required by the Constitution or the Congress, it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure," and that "federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." Id., at 426. See e.g., Bank of Nova Scotia v. United States, 487 U. S. 250, 254-255.

The Fifth Circuit Court recently concurred that inherent power "is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function." Crowe v. Smith, 151 F.3d 217-220, No. 96-30851 (5th Cir.) (1998), citing Chambers, 501 U.S. at 42 (quoting NASCO, Inc. v. Calcasieu Television and Radio, Inc., 894 F.2d 696, 702 (5th Cir. 1990)). Further, "As the Supreme Court has explained, '[b]ecause inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." Crowe at 217, citing Shepherd v. American Broadcasting Companies, 62 F.3d 1469, 1475 (D.C. Cir. 1995)), quoting Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980)).

Despite the abundant federal case law on the exercise of inherent authority and its limitations, the Massachusetts Supreme Judicial Court relied on the few state cases discussing bail revocation procedures, concluding that "Notwithstanding the provisions of the third paragraph of G. L. c. 276, § 58, and any inquiry into dangerousness, a court has inherent power to revoke a defendant's bail for breach of any condition of release." (See App. A - 9). That conclusion is not supported by federal law or even by any of the decisions cited in its opinion. Furthermore, it is significant to note that most of the cases relied upon by the court were decided well before the bail statutes were reformed in 1984.

First, in Rendel v. Mummert, 106 Ariz. 233; 474 P.2d 824 (1970), the only mention of inherent authority to revoke release refers to revocation when the court finds a defendant may flee to avoid trial. Id., at 238. In addition to adding little support for the revocation of bail by inherent authority, the probable cause described in that case that is necessary to revoke bail is "more evidence for, rather than against....guilt,...and there must exist such...facts...to believe and conscientiously entertain a strong suspicion...of...guilt...." Id., at 238. That is a much more demanding one than the probable cause to arrest standard sanctioned by the Supreme Judicial Court in the case at bar.

In People ex rel. Hemingway v. Elrod, 322 N.E.2d 837, 60 Ill.2d 74 (1975), the Illinois Supreme Court was not dealing with an issue of inherent authority to revoke bail, but the sole issue was whether an accused charged with murder may be held without bail where punishment by death was not a possibility. Nevertheless, the Supreme Judicial Court cites that case to support the concept of revocation by inherent authority, summarizing that "The court has

the inherent authority to enforce its orders and to require reasonable conduct from those over whom it has jurisdiction." (See App. A - 10). What that case in fact authorizes is not inherent authority under any condition to revoke bail, but only in specific circumstances such as "keeping an accused in custody pending trial to prevent interference with witnesses or jurors or to prevent the fulfillment of threats... 'We think that under both the United States and Illinois constitutions the denial of bail to an accused *under such circumstances* is within the inherent power of the court.'" Id., at 840, 841. (emphasis added). What the Supreme Judicial Court did not include from Hemingway is that the Ill. Code of Criminal Procedure sets out a very specific process to be followed when inherent authority is exercised when bringing a defendant before the court for a hearing on an alleged breach or threatened breach of any of the conditions of the bail bond. Ill. Code of Criminal Procedure, §110.6(a)(d). The court there recognized those limitations of its authority, instructing that "...the court has the authority *to impose sanctions* for the violation of conditions...while released on bail or recognizance, including...revocation of...release *in the manner provided in Standards 5.6, 5.7 and 5.8.* (emphasis added). It is also significant to note that in their *current* form, the relevant sections of the Illinois bail statute dealing with revocation of bail include much greater procedural protections than the Massachusetts revocation statute and the procedure sanctioned by the court in this case. Those protections include revocation only for specific crimes, clear and convincing evidence, the opportunity for the accused to testify, to present witnesses in his behalf, and to cross examine witnesses if any are called by the State. See Ill. Code of Criminal Procedure, §110.6.

Another case relied on by the Supreme Judicial Court is Ct. v. Ayala, 22 Conn. 331 (1992). That court also did not exercise inherent authority to revoke bail. To the contrary, an evidentiary hearing was held in accordance with a constitutional statutory scheme for revoking bail. Id., at 336. In addition to providing little support to revocation of bail by inherent authority, the procedure there was much more demanding than the procedures sanctioned by the court in the case at bar. In order to revoke bail there, the court first had to find that the crime for which the defendant had been on release was one punishable by a term of ten or more years in prison. Next, there must have been a finding by clear and convincing evidence that the defendant posed a danger to another, and finally, that there was probable cause the defendant had committed a crime while on release. Id., at 333, 334.

The final case relied on by the Supreme Judicial Court is Mello v. Superior Court, 117 R.I. 578 (1977), which is the only case cited that supports bail revocation of bail under the court's inherent authority. Notwithstanding that contention, the court in Mello went on to emphasize the need for adequate procedural protections, directing that "a defendant facing bail revocation is jeopardized at least as much as one facing revocation of parole or probation....therefore the rights afforded ...in these latter situations must attach to a defendant in a bail revocation proceeding." Id., at 587. Moreover, the court there recognized that the due process requirements apply to bail revocation proceedings, stating "one cannot argue that the deprivation of liberty which follows....revocation does not condemn one to suffer grievous loss." Id., at 586, citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 647 (1951). The court in Mello also directed a higher standard of proof than probable cause

at such a hearing, stating "We adopt that standard of proof for bail revocation hearings as one which will require the state to go beyond probable cause and will afford a defendant the necessary due process." Mello, at 587.

An examination of the Supreme Judicial Court's own position on the exercise of inherent authority in a relatively recent case seems to reveal a very different viewpoint than the decision in this case. In, Brach v. Chief Justice of the District Court Department, 386 Mass. 528 (1982), the court stated that inherent powers are those "whose exercise is essential to the function of the judicial department, to the maintenance of its authority, or to its capacity to decide cases." Brach, citing Sheriff of Middlesex Cty. v. Comm. of Corr., 383 Mass 904, 922 (1974). Adding further that "All of the inherent powers recognized by this court, however, have involved the internal functioning of the judiciary," Id., at 535 and, "[t]he very conception of inherent authority carries with it the implication that its use is for occasions not provided for by established methods..." Id., at 536. 4

While declaring that it has the power to exercise its inherent authority to revoke bail, the Supreme Judicial Court in this case never discussed such in the context of "contempt." In fact, the only use of the word contempt in their opinion appears in cases cited. (See App. A - 10). Yet by their own description, the revocation of bail at issue was clearly for contempt. First, the court disclaimed that the purpose of revoking bail under §58 is to protect the public from danger, only doing so incidentally, but that its purpose is really "to ensure compliance with our legal system and preserve its integrity" and "assure compliance with...laws and.... preserve the integrity of the judicial process by exacting obedience

with its lawful orders." (See App. A – 11, 12). This amounts to contempt as it has historically been described by this and other courts. See United States v. Dixon, 509, U.S. 688 (1993) "To place these cases in context, one must understand that they are the consequence of an historically anomalous use of the contempt power. In both...a court-issued an order directing a particular individual not to commit criminal offenses." Id. at 694. That is exactly what happened in this case.

While disclaiming dangerousness as a basis for revocation may allow avoidance of the more demanding procedures required under §58A, the court cannot then be allowed to rely on the concept of contempt, yet authorize an unprecedented, less protective procedure than that which is historically required in such an action. While it is well settled that "the power to punish for contempts is inherent in all courts, has been many times decided and may be regarded as settled law." Young v. U.S. ex rel. Vuitton, 481 U.S. 787 (1987) quoting Michaelson v. U.S. ex rel. Chicago, St. P.,M., & O.R. Co., 266 U.S. 42 (1924), it is equally well established that certain procedures must be followed in such cases. In United Mine Workers v. Bagwell, this Court instructed clearly on the process that is due in contempt actions:

> "Summary adjudication becomes less justifiable once a court leaves the realm of immediately sanctioned, petty, direct contemps."... "Still further procedural protections are afforded for contempts occurring out of court, where the considerations justifying expedited procedures do not pertain. Summary adjudication of indirect contempts is prohibited, e.g., Cooke v. United States, 267 U.S. 517, 534 (1925), and criminal contempt sanctions are entitled

> to full criminal process. E.g., Hicks, 485 U.S. at 632." and "Contempts involving out-of-court disobedience to complex injunctions often require elaborate and reliable factfinding. Cf. Green, 356 U.S. at 217, n. 33 (Black, J., dissenting) (citation omitted) ("Alleged contempts committed beyond the court's presence where the judge has no personal knowledge of the material facts are especially suited for trial by jury. A hearing must be held, witnesses must be called, and evidence taken in any event."…. "Under these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power." Bagwell, at 832, 833.

Other leading cases providing direction on the proper procedure in a criminal contempt direct that:

> "Due process cannot be measured in minutes and hours or dollars and cents. For the accused contemnor facing a jail sentence, his 'liberty is valuable and must be seen as within the protection of the fourteenth amendment. Its termination calls for some orderly process, however informal'" Taylor v. Hayes, 418 U.S. 488, 500 (1974) quoting Morrissey v. Brewer, 408 u.s. 471, 482 (1972).

and also:

> The distinction between in-court and out-of-court contempts has been drawn not to define when a court has authority to initiate a contempt prosecution, but to

> prescribe the procedures that must attend the exercise of that authority.....Thus, for instance, this Court has found that defendants in criminal contempt proceedings must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves, Gompers, supra, at 444; must be advised of [481 U.S. 799] charges, have a reasonable opportunity to respond to them, and be permitted the assistance of counsel and the right to call witnesses, Cooke v. United States, 267 U.S. 517, 537 (1925); must be given a public trial before an unbiased judge, In re Oliver, 333 U.S. 257 (1948); and must be afforded a jury trial for serious contempts, Bloom, supra. Congress also has regulated the manner in which courts exercise their power to prosecute contempts, narrowing the class of contempts subject to summary punishment, Act of Mar. 2, 1831, 4 Stat. 487. Furthermore, Rule 42 itself distinguishes between contempt committed in the presence of the court, which may be summarily punished, and all other contempts, which may be punished only upon notice and hearing....The use of this Court's supervisory authority has played a prominent role in ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness. (footnotes omitted). Young v. U.S. ex rel. Vuitton, 481 U.S. 787, 798, 799 (1987).

and finally, in determining the nature of the proceeding for purposes of applying due process:

> When a State's proceedings are involved, state law provides strong guidance about whether or not the State

> is exercising its authority "in a nonpunitive, noncriminal manner," and one who challenges the State's classification of the relief imposed as "civil" or "criminal" may be required to show "the clearest proof" that it is not correct as a matter of federal law. Allen v. Illinois, 478 U.S. 364, 368-369 (1986). Nonetheless, if such a challenge is substantiated, then the labels affixed either to the proceeding or to the relief imposed under state law are not controlling, and will not be allowed to defeat the applicable protections of federal constitutional law. Ibid. This is particularly so in the codified laws of contempt, where the "civil" and "criminal" labels of the law have become increasingly blurred. (footnotes omitted). Hicks v. Feiock, 485 U.S. 624 , 631 (1988).

and,

> Instead, the critical features are the substance of the proceeding and the character of the relief that the proceeding will afford. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt, the sentence is punitive, to vindicate the authority of the court. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441 (1911). The character of the relief imposed is thus ascertainable by applying a few straightforward [485 U.S. 632] rules. If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the

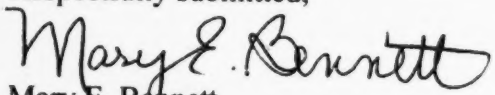
sentence is limited to imprisonment for a definite period." Id. at 442. Hicks, at 631, 632.

The Supreme Judicial Court's contention in the case at bar that "determinations of probable cause and dangerousness can be made without a full-blown evidentiary hearing and without "significant risk of an erroneous deprivation of liberty.", and "...can be adequately presented and decided based on documents (e.g., police reports) and the representations of counsel.," and that "an evidentiary hearing with the right to present and cross-examine witnesses, or some variation, *may* be held *in the judge's discretion* when the circumstances of a particular case warrant." (emphasis added) (See App. A - 16), represents a drastic departure from settled constitutional law that contempt proceedings must afford the accused certain minimum due process protections. In this case, the procedure sanctioned by the court was contrary to those principals, unfair, and in violation of the Petitioner's rights under the Fourteenth Amendment.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,



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